



**Analysis and Suggestions**  
**on**  
*Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Undertakings*

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For the lectures of PRC and EU antitrust seminar

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# The Standards Applicable to Simple Cases

## Conditions

1. Where **in the same relevant market**, the total market share of all undertakings participating in the concentration is less than **15%**;
2. Where **an upstream or downstream relationship** exists among the undertakings participating in the concentration, the market share of such undertakings is less than **25%** in both the upstream and the downstream markets;
3. Where **no upstream or downstream relationship** exists among the undertakings participating in the concentration, the market share of such undertakings is less than **25%** in each market;
4. Where an undertaking participating in the concentration **establishes a joint venture enterprise outside the territory of China**, the joint venture enterprise **does not engage in any economic activities within the territory of China**;
5. Where an undertaking participating in the concentration **acquires the equity or assets of an overseas enterprise**, the overseas enterprise **does not engage in any economic activities within the territory of China**; or
6. A joint venture enterprise that is **jointly controlled** by two or more undertakings will be **controlled by one or more of such undertakings** after concentration.

Conditions of market shares

Conditions of Economic activities area

Change in joint control

# The Standards Applicable to Simple Cases

## Exclusions

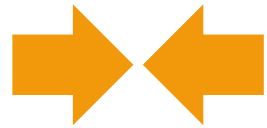
1. Where a joint venture enterprise that is jointly controlled by two or more undertakings will be controlled by one of such undertakings after concentration, and this undertaking and the joint venture enterprise are **competitors on the same relevant market**;
2. Where it is **difficult to define the relevant market** involved in the concentration of undertakings;
3. Where the concentration of undertakings may adversely affect **market entry or technological improvement**;
4. Where the concentration of undertakings may adversely affect **consumers and other undertakings**;
5. Where the concentration of undertakings may adversely affect **national economic development**; or
6. Other situation where the MOFCOM holds that the concentration of undertakings may adversely affect **market competition**.

Specific  
Regulations

Abstract  
Regulations

# Comparison with EU Rules

Overall



## Similarities:

- Determine which case shall be deemed as a simple case by both conditions and exclusions;
- The major standards are both about:
  - Market shares
  - Engaging in economic activities within the territory or not
  - Change of joint control
  - Difficulty of market definition
  - Barriers to entry into market



## Differences:



- Legislation for applicable standards to simple case (simple procedure) separately
- Most of the exclusion conditions in China rules are abstract which take into account the factors stipulated by Article 27 of AML



- Legislation about all the aspects of simple procedure including applicable standards
- In the aspect of exclusion conditions, besides guarantying the discretion of EU commission, EU rules lists the circumstances which may not apply the simple procedure. Such way of legislation protects both foreseeability and flexibility

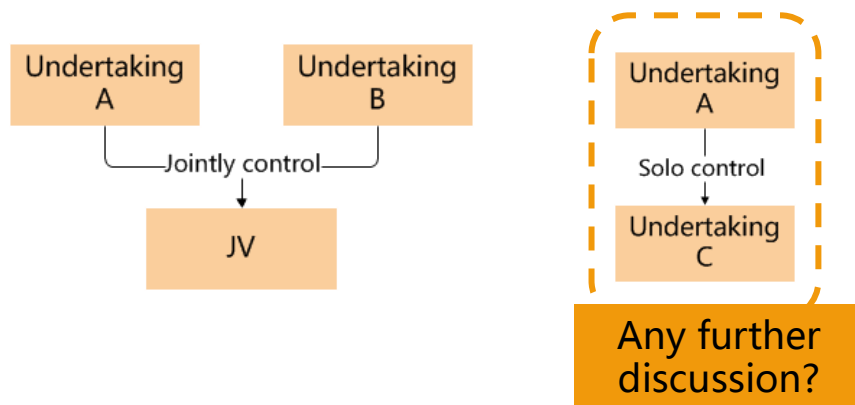
# Analysis and Suggestions

## About no economic activities within the territory of China

**Suggestion** : Further clarifying the conditions based on the comparison of Article 2.4, 2.5 of *Interim Provisions* and relevant EU rules



➤ After concentration:



➤ The way of concentration :

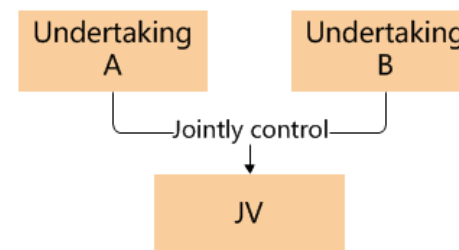
- ✓ Establishment of JV
- ✓ Acquisition of the equity
- ✓ Acquisition of the assets

Obtaining the control over or becoming capable of exerting decisive influence on other undertakings through contracts or by any other means.

Any further discussion?



➤ After concentration:



➤ The way of concentration :

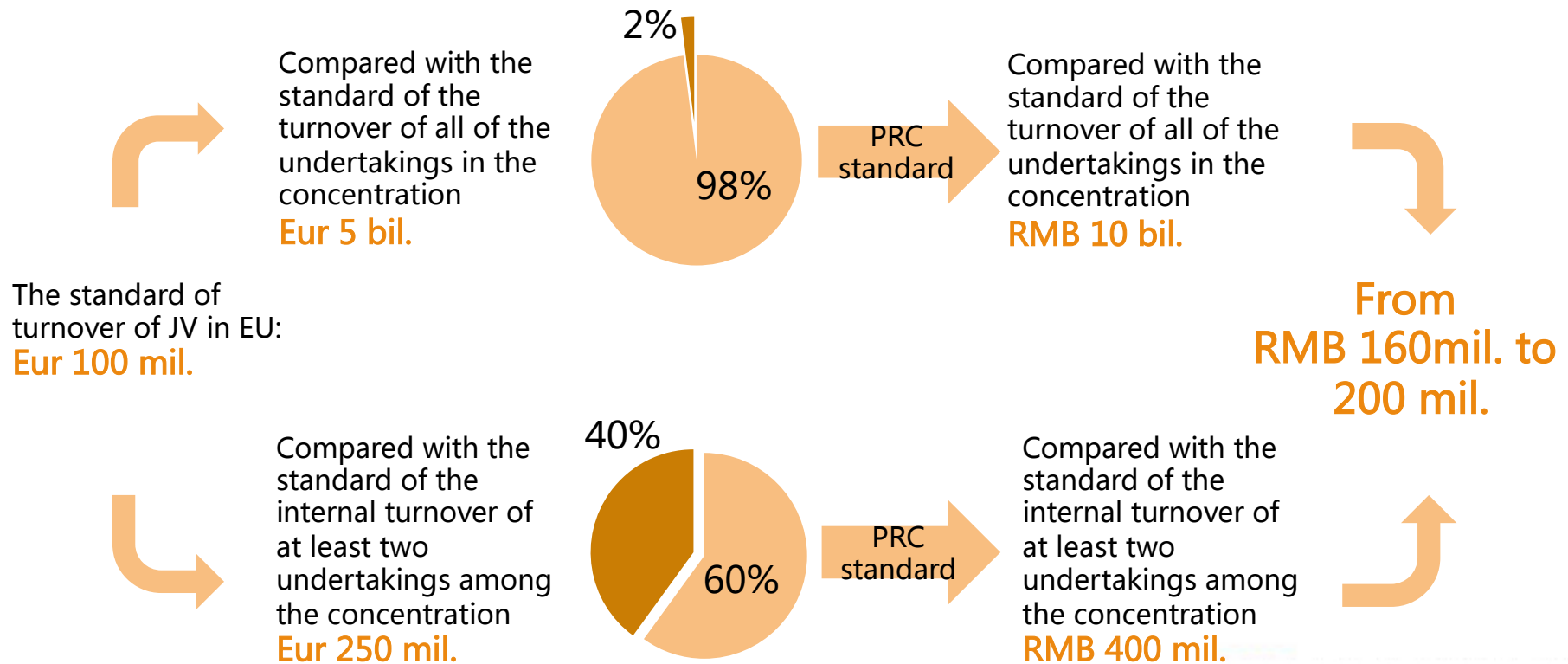
- ✓ Any way of concentration

# Analysis and Suggestions

## About no economic activities within the territory of China

**Suggestion:** Amending “does not engage in any economic activities within the territory of China within the territory of China” to “does not engage in any economic activities within the territory of China **or such economic activities are negligible**”, and clarifying the standards of “negligible” through identifying the limitation of the turnover (or/and domestic assets).

The recommended method to calculate the standard of JV’s turnover as condition of simple case

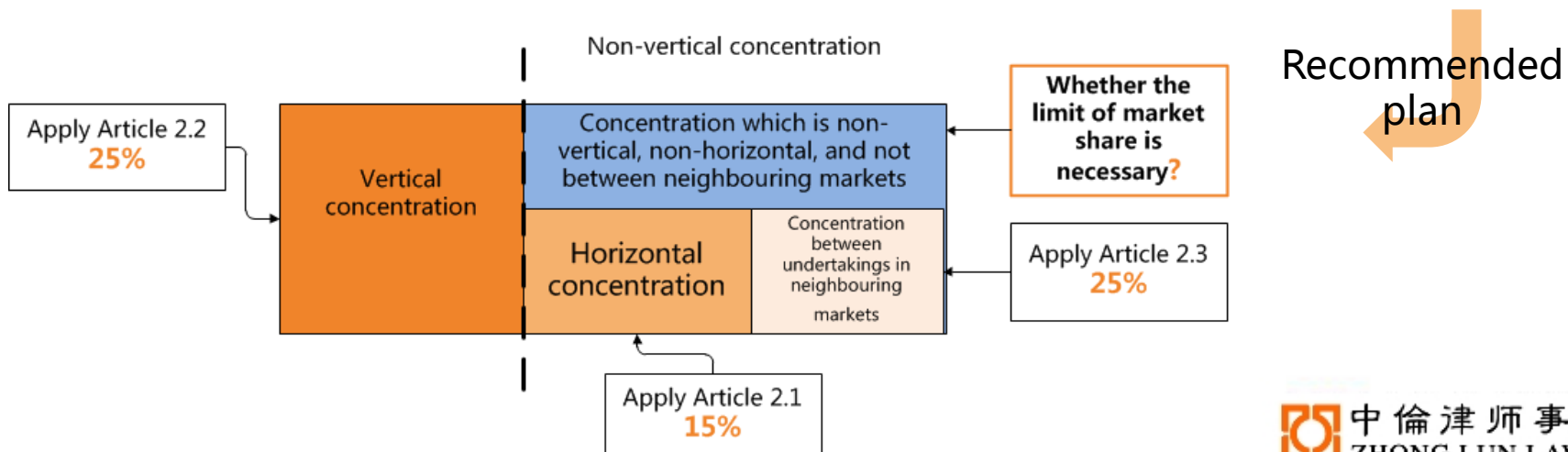
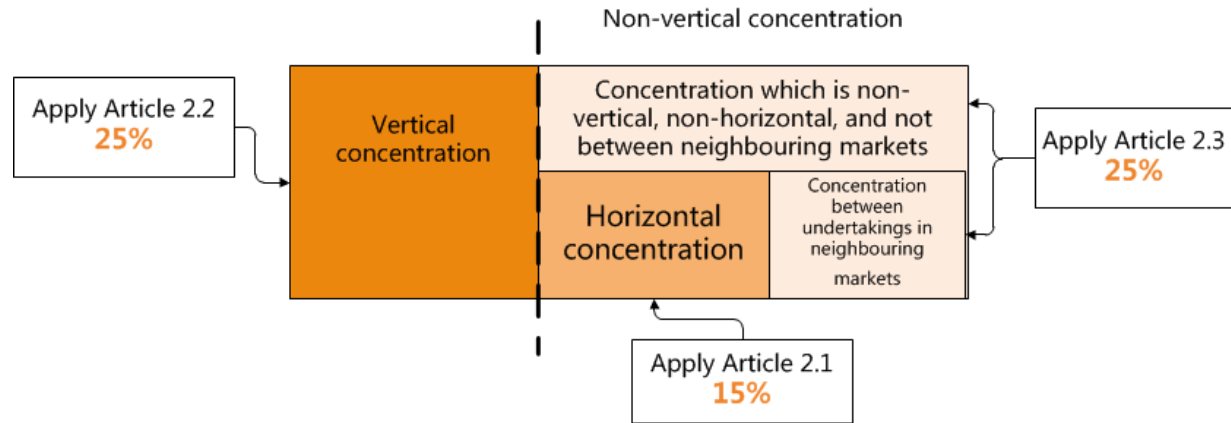


# Analysis and Suggestions

## About the limitation on the market shares

**Suggestion:** Considering the EU rules and that the concentration of undertakings which are not in the same relevant market, not in the upstream and downstream market, and even not in the neighbouring markets may normally lead less influence on competition, the Article 2.1-2.3 of *Interim Provisions* might be amended.

According to Article 2.1-2.3 of *Interim Provisions*





# Analysis and Suggestions

## About the exclusion

**Suggestion:** Besides the abstract exclusion which ensure the flexibility, according to the EU rules, the specific exclusion (or recommended example of exclusion) may be listed in order to increase the foreseeability of exclusion

White List	➔	The conditions of simple case could be amended based on the Article 2 of <i>Interim Provisions</i>
Grey List	➔	The grey list could be amended based on the Article 3.3-3.6 for ensuring the flexibility
Black List	➔	For providing the foreseeability to the standards applicable to simple cases, the black list could be amended based on the Article 3.1-3.2, according to the relevant rules in EU and the experiences of practice in PRC

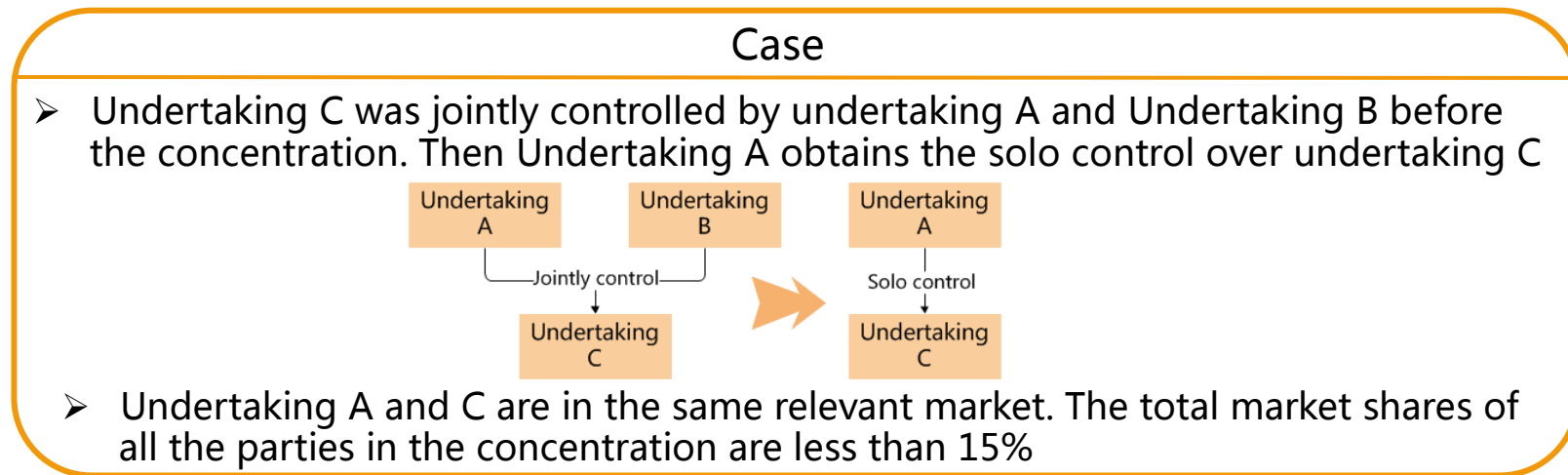
**Recommended exclusions** ( black list ) according to the relevant rules of EU :

- Certain types of concentrations may increase the parties' market power, for instance by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market
- It may not be possible to determine the parties' precise market shares, which is the often case when the parties operate in new or little developed markets
- Concentrations in markets with high entry barriers, with a high degree of concentration
- When the purpose of establishment of JV is coordinating other independent undertakings

# Analysis and Suggestions

## About the target of the exclusion

It shall be clarified that whether the Article 3.1 is the exclusion of Article 2.6, or the exclusion of all the conditions. If the case is considered as a simple case based on Article 2.1, whether or not the Article 3.1 shall be applied?



Apply Article 2.6

Preliminary judgment: simple case

Apply Article 3.1

It shall not be considered as simple case

Apply Article 2.1

Preliminary judgment: simple case

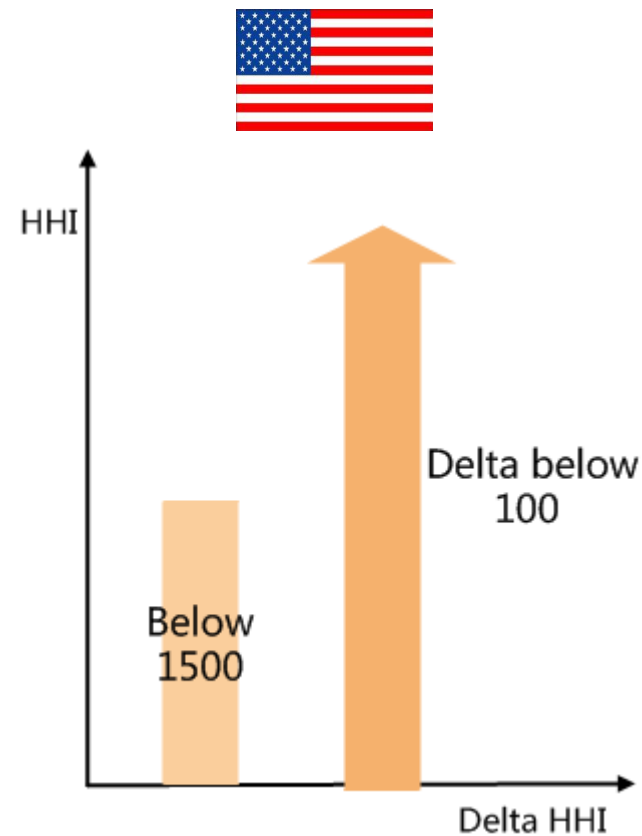
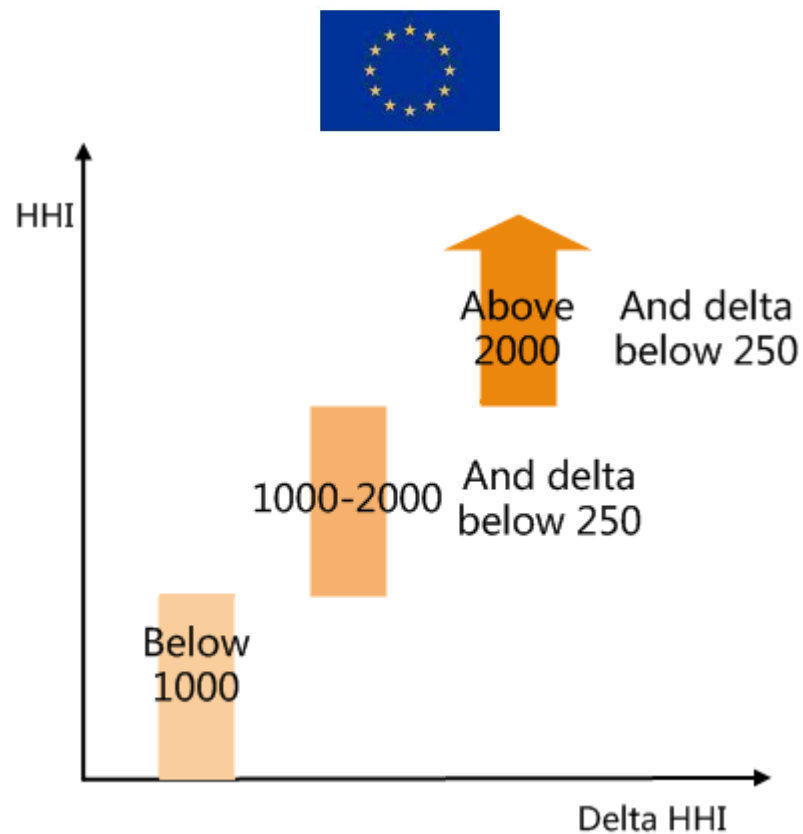
Whether apply 3.1?

**Suggestion:**  
Clarifying the Scope of application

# Analysis and Suggestions

## About the limitation on the degree of concentration

**Suggestion:** According to the EU rules, “the relevant market has a high degree of concentration” may be applied as one of the exclusions of the simple case. Meanwhile, the standard of “high degree” is suggested to be provided.



# Analysis and Suggestions

## About the impact on the other undertakings

### Comparison

- According to Article 27 of the *AML*, **the impact** of the concentration on the other undertakings shall be taken into account in the examination of the concentration.
- According to Article 3 of the *Interim Provisions*, Where the concentration may **adversely affect** other undertakings, the concentration shall not be considered as a simple case.

**We understand that** the standard of examination of concentration may be inappropriate standard applicable to simple case.

### Especially in practice that,

- In the case of horizontal concentration, even if such concentration may not lead to material impact on the competition, other undertakings (especially, the competitors) might be adversely affected.
- In the case of vertical concentration, even if such concentration may promote the competition and benefit the consumers by means of “internalisation of double mark-ups” , or increasing the production capacity of upstream or downstream, other undertakings (especially, the competitors) might be adversely affected.

**Suggestion:** Amending the Article 3.4 based on the understanding that “the adverse effect on the other undertakings” does not inevitably lead to the “adverse effect on competition” .

# Relevant Rules under EU Laws

## Conditions

Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2005/C 56/04)

- Two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:
  - the turnover of the joint venture, and/or the turnover of the activities contributed by the parties is less than EUR 100 million in the EEA territory;
  - and the total value of assets transferred to the joint venture is less than EUR 100 million in the EEA territory;
- Two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged;
- Two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and:
  - two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 15 %; or
  - one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), provided that none of their individual or combined market shares is at either level 25 % or more;
- A party is to acquire sole control of an undertaking over which it already has joint control.

# Relevant Rules under EU Laws

## Exclusions

- Where it is difficult to define the relevant markets or to determine the parties' market shares
- Where it requires a closer investigation and/or a full decision
- Certain types of concentrations may increase the parties' market power, for instance by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market.
- Concentrations where at least two parties to the concentration are present in closely related neighbouring markets may also be unsuitable for the simplified procedure, in particular, where one or more of the parties to the concentration holds individually a market share of 25 % or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighbouring market to a market where another party is active
- When it may not be possible to determine the parties' precise market shares. This is often the case when the parties operate in new or little developed markets
- Concentrations in markets with high entry barriers, with a high degree of concentration
- A change from joint to sole control may exceptionally require closer investigation and/or a full decision
- Where neither the Commission nor the competent authorities of Member States have reviewed the prior acquisition of joint control of the joint venture in question
- When the purpose of establishment of JV is coordinating other independent undertakings
- If a Member State expresses substantiated concerns about the notified concentration, or if a third party expresses substantiated concerns within the time-limit

Thanks